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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 703 40

OKLAHOMA TAX COMMISSION,

Appellant,

vs.

THE TEXAS COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 703

THE TEXAS COMPANY, A CORPORATION,

Appellee.

vs.

OKLAHOMA TAX COMMISSION,

Appellants

STATEMENT AS TO JURISDICTION

This case originated before the Oklahoma Tax Commission where hearing was duly had and the tax assessment complained of duly made by a timely order of that Commission that under the laws of the State of Oklahoma an aggrieved taxpayer in the exercise of statutory rights, may file a suit in the District Court of Oklahoma County wherein a trial of the issues may be had; such a case was so filed in the District Court of Oklahoma County, which court sustained a general demurrer to the petition of the plaintiff in that case, the Texas Company, appellee in this appeal, from which said judgment, the Texas Company appealed to the Supreme Court of Oklahoma wherein the said judgment of the District Court of Oklahoma County, Oklahoma, was reversed and in which the said State Supreme Court held:

“A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease

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approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state excise tax of one-eighth of one cent per barrel, nor the state gross production tax of five per cent of the value of the oil produced."

That upon the rendition of said opinion, petition for rehearing was filed with the Supreme Court of the state and while said petition was pending, a motion was filed with the permission of said court (without prejudice to appellant, Tax Commission's petition for rehearing and without prejudice to its right of appeal) wherein the court was asked to modify its opinion upon the ground that it having been alleged by the plaintiff in error, oil company, and admitted by the defendant in error, the Oklahoma Tax Commission, that the oil and gas constituting the subject matter of the tax, was produced from what is commonly termed restricted Indian land under departmental leases under the supervision and regulation of the Secretary of the Interior in the same manner that all oil and gas is so produced from Indian lands under the jurisdiction of the Secretary of the Interior are managed and handled.

Whereupon, the court entered its final order and judgment modifying and correcting the former opinion in which said cause was reversed, thereby entering a judgment appealable to this court; the Supreme Court of the State of Oklahoma being the highest court of the state as defined in the United States Statute and the rules of this Court authorizing appeal. The case was, therefore, remanded to the District Court with instructions to enter judgment for the plaintiff, the Texas Company, as directed.

Whereupon, a motion to withhold mandate pending an appeal to the Supreme Court of the United States was timely filed and on the 10th day of February, 1948, the Supreme Court of the State of Oklahoma made and entered the following order:

"In the Supreme Court of the State of Oklahoma The Clerk is Hereby Directed to Enter the Following Orders:

32,270—The Texas Co. v. Oklahoma Tax Commission.

32,678—Magnolia Petroleum Co. v. Oklahoma Tax Commission.

Ordered that mandate in the above styled causes be stayed until April 29, 1948, pending appeal to the U. S. Supreme Court, and thereafter until Final disposition by that court if appeals are perfected within time allowed."

The State Statute involved in this controversy is found in Ch. 20, Title 68, Sec. 821 *et seq.* O. S. 1941, as amended by Ch. 20, Sec. 827, O. S. 1947, Cumulative Supplement, and also found in 1947 S.L. page 495 as Articles 1 and 2. The levying clause under which the said tax involved in this litigation is levied is Sec. 821 O. S. 1941, and levies a tax of 5% on the gross amount at the actual cash value of all the oil and gas produced within the State of Oklahoma, which said tax when so levied shall be in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon producing leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper, or for petroleum or other crude oil or other mineral oil, or for natural gas and/or casinghead gas, upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil.

The said Act further provides that the State Board of Equalization upon its initiative or upon motion may take testimony and if the rate of tax levied shall be found to be greater or less than the general *ad valorem* rate of taxation, then said Board may raise or lower the rate to conform to the general average of the *ad valorem* tax rate throughout the state in order to effect uniformity and equality under the Constitution since the gross production tax is in lieu of and a substitute for the *ad valorem* property tax.

The decision of the Supreme Court in holding that said Statute was invalid as applied to oil and gas produced from restricted lands belonging to the oil company producer, in that to apply such tax, violated the rights of said oil company, the Texas Company, under the various Acts of Congress, particularly the General Allotment Act of June 28, 1906, 34 Statute, 339, and the various amendments thereto wherein the trust period of said property belonging to restricted Indians of one-half or more Indian blood was extended finally to 1984.

The Federal statutory provision believed to sustain the jurisdiction of this Court is Sec. 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. Secs. 344(a), 861(a)).

Some of the decisions which are believed to sustain the jurisdiction are those interpreting the said Acts of Congress relating to Indian restrictions in the light of the State taxing power to-wit:

Oklahoma Tax Commission v. United States, 319 U. S. 598;

Helvering v. Mountain Producers Corporation, 303 U. S. 379, and a state case.

Santa Rita Oil Company v. State Board of Equalization (Idaho), 116 Pac. (2), 1012, which passes squarely and identically upon all the issues herein and following the *Mountain Producers'* case, sustains the tax of the State of Idaho on restricted Indian properties holding that all cases heretofore standing in the way of the admissibility of such tax are overruled. In that case it is further held:

"Nondiscriminatory operators' net proceeds and producers' license or gross production taxes on production of oil and gas under lease of trust patent Indian land do not constitute such direct and substantial interference with any function of federal government as to be invalid. Rev. Codes 1935, §§ 20888-2096.2, 2397-2408."

The Federal Question

The Federal question involved in this lawsuit is the denial to the State of Oklahoma and the Oklahoma Tax Commission of the right to levy, assess and enforce the revenue laws enacted for the support of the State and local governments on the ground that same contravene the Indian treaties with the United States, the Allotment Act and in violation of the interpretation and construction of such treaties and Acts by the judiciary of both the State and national governments and particularly by the judgments of the United States Courts, including the Supreme Court thereof, in that to deny the State of its rights to tax, tends to destroy State and local government and deprives the State of its exercise of its first sovereign power necessary for the existence, and denies to the State the equal protection of the law as among States under the Constitution of the United States. Said Federal questions were raised in the briefs filed in the Supreme Court and in the petition for rehearing and in the oral argument presented to said Court. It is, therefore, apparent that the construction and interpretation of the Acts of Congress are detrimental and

prejudicial to the rights of Oklahoma and the construction and interpretation of the Constitution of the United States with reference to the Oklahoma taxing statute and directly involved and drawn into question and have been decided adversely to the rights of the State of Oklahoma and Oklahoma Tax Commission, prosecuting this case in its behalf under statutory authority to do so as the constituted tax collecting agency for the collection and enforcement of all State tax measures.

That the judgment of the State Supreme Court constitutes a final judgment of the highest court of the State under the rules of this Court and the Act of Congress contained in the Judicial Code.

WHEREFORE, it is respectfully submitted that for the reasons stated, this Court has jurisdiction of the appeal.

Dated this 18 day of February, 1948.

Respectfully submitted,

MAC Q. WILLIAMSON,
Attorney General;

FRED HANSEN,
Asst. Attorney General;

R. F. BARRY,
Counsel for Appellant.

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APPENDIX "A"

**IN THE SUPREME COURT OF THE STATE OF
OKLAHOMA**

Filed in Supreme Court of Oklahoma, Sep. 23, 1947.
Andy Payne, Clerk.

No. 32,270

THE TEXAS COMPANY, a Corporation, *Plaintiff in Error*,

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error*

Syllabus

1. A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil is produced is not subject to the state excise tax of one-eighth of one cent per barrel, nor the state gross production tax of five per cent of the value of the oil produced.

Appeal from the District Court of Oklahoma county.
Hon. Lucius Babcock, Judge.

Action by the Texas Company, a corporation, against the Oklahoma Tax Commission to recover certain oil excise taxes and gross production taxes paid under protest of illegality. From an order sustaining demurrer to plaintiff's petition and rendering judgment for defendant, the plaintiff appeals.

REVERSED

Amos, Monnet, Hayes and Brown of Oklahoma City, Okla., Y. A. Land, John R. Ramsey, B. W. Griffity, all of Tulsa, Okla., for Plaintiff in Error.

E. L. Mitchell and C. W. King of Oklahoma City, Okla.,
for Defendant in Error.

WELCH, J.

This action tests the validity of certain state tax assessments, gross production and oil excise tax, made against the Texas Company for oil production, under departmental leases on restricted lands of Kiowa and Apache Indians.

The plaintiff, hereinafter referred to as "Company," paid the taxes under protest to the Oklahoma Tax Commission, (hereinafter referred to as "Commission,") and sued for recovery back. Plaintiff claimed there was legal immunity from such taxes because in the operation of such leases and in the production of such oil, "Company" was an instrumentality of the federal government.

That such a lease is an instrumentality of the federal government has been held in many cases hereinafter cited. Among the first such cases, if not the first, was *Indian Territory Illuminating Oil Company v. Oklahoma*, 240 U. S. 522, 60 L. ed. 779.

As applied to a gross production tax on oil, the exact contention of "Company" of immunity from such tax was sustained in *Large Oil Co. v. Howard*, 248 U. S. 549, 63 L. ed. 416, and in *Howard v. Gypsy Oil Co.*, 247 U. S. 504, 62 L. ed. 1239.

And the United States Congress has acted on the theory that such immunity exists in the case of leases of this character unless waived. The Congress has adopted acts expressly waiving such immunity and granting to this State the authority to apply the gross production tax as to certain designated Indian lands, the Osage Indian Lands by act in 1921 (41 Stat. at L. 1250), the Kaw Indian Lands by act in 1924 (43 Stat. at L. 176-177), and as to lands of the Five Civilized Tribes by act in 1928 (43 Stat. at L. 496.)

As applied to the oil excise tax the exact contention of immunity from such tax here made by "Company" has been sustained by this court in *Barnsdall Refineries, Inc. v.*

Oklahoma Tax Commission, 171 Okla. 145, 145 P. (2d) 918, affirmed in *Oklahoma v. Barnsdall*, 296 U. S. 521, 80 L. ed. 366.

Thus it has been established and for many years recognized in this court, in the Congress and in the Supreme Court of the United States, that in the case of such leases neither of the taxes here involved may be imposed without waiver of immunity or permissive legislation by the Congress.

But the "Commission" contends that, in foundation, the above rule rests upon other and former decisions of the Supreme Court of the United States dealing generally with the "governmental instrumentality" rule, and that all such former decisions as well as those heretofore cited, were in effect overruled in *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 82 L. ed. 907.

Upon consideration of that point we observe the Mountain Producers case relates to income tax assessed against the net income or personal profit earned by a lessee in a position similar to that of "Company".

Long prior to the Mountain Producers case that court had extended the governmental instrumentality rule to include such personal income or profit within the tax immunity, and had held that income tax could not be assessed against such an oil and gas lessee. See *Gillespie v. Oklahoma*, 257 U. S. 501, 66 L. ed. 338, and *Burnett v. Coronado Oil and Gas Co.*, 285 U. S. 393, 76 L. ed. 815.

The decision in the Mountain Producers cases was a reconsideration of that exact income tax question, and in the latter case that court held that such extension of the governmental instrumentality rule was without adequate foundation or support, and that court expressly overruled the two former decisions, the Gillespie case and the Burnett case, and expressly held in the Mountain Producers case that the income tax might properly be assessed.

While that court thus specifically restricted the limits of the governmental instrumentality rule to that extent, we do not find in that decision any abolition of the rule, or any further departure from former application of the rule than is specifically made in and by that decision.

The Mountain Producers case specifically overruled the two former income tax cases mentioned, but did not expressly overrule either of the gross production tax cases above cited nor the Barnsdall case, *supra*, nor indicate any specific intention of so doing.

It is the view of the writer of this opinion, speaking for himself alone, that for the reasons pointed out in the briefs one might well join in the request that the Supreme Court of the United States reconsider this question as applied to a tax on the oil as it did reconsider the question as applied to the tax on the personal income or net profit of the oil producer, which consideration resulted in a reversal of the rule as to such income tax as we have noted. But it is thought beyond the power of this court to now engage in such reconsideration, in view of the cited decisions of the higher authority which thus far wholly sustain the claim of "Company" to immunity from the tax here involved.

Upon questions of federal law, citizens and their attorneys have the right to rely upon decisions of the Supreme Court of the United States, and upon such questions it is our fixed duty to follow such decisions, leaving to the United States Congress or Supreme Court the making of the necessary changes in such legal rules.

In a later case, *United States v. County of Allegheny*, 322 U. S. 174, 88 L. ed. 1209, the Supreme Court of the United States recognized that *the* in the Mountain Producers case the rule of implied immunity had been "sharply curtailed," but that is not to say an abolition of the rule, but a limitation or curtailment thereof, definitely leaving the balance thereof in full force. —

Other authorities are cited to support the view of "Commission" as to the implied or extended effect to be given the Mountain Producers decision. We have considered them but find further discussion of them not necessary, other than to say that we cannot construe the decision in the Mountain Producers case to go to the extent contended for.

We regard the decisions of the Supreme Court of the United States, *supra*, as binding upon us, and in view

thereof the plaintiff's petition stated a cause of action. It was error to sustain a demurrer thereto.

The judgment for defendant is reversed, with directions to overrule the demurrer to plaintiff's petition and proceed consistent with the views here expressed.

Hurst, C. J., Davison, V. C. J., Riley, Gibson and Luttrell, JJ., concur.

Corn, J., dissents.

Filed in Supreme Court of Oklahoma, Jan. 22, 1948.
Andy Payne, Clerk.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 32,270

THE TEXAS COMPANY, a Corporation, *Plaintiff in Error*,

vs.

OKLAHOMA TAX COMMISSION, *Defendant in Error*

Order Correcting Opinion

It is ordered that the opinion filed herein on September 23, 1947, be, and the same is corrected in the following two particulars, to-wit:

I. That on the Caption Sheet the word "Reversed" is stricken and in lieu thereof the following words are inserted, to-wit: "Trial Court Judgment For Defendant Reversed and Judgment Rendered For Plaintiff."

II. The last paragraph of the opinion is hereby stricken and in lieu thereof the following paragraph is inserted to-wit:

"The trial court judgment for defendant is reversed. And since there is no question as to the aforesaid

facts, which are alleged by plaintiff and admitted by defendant, final judgment is hereby rendered for plaintiff and against the defendant for the sum sued for. The cause is remanded with directions to the trial court that such judgment be duly entered of record."

Done by order of the Court in conference this 22 day of January, 1948.

THURMAN S. HURST,
Chief Justice.

(5625)

